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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 1127

WORTH MUNN, *et al.*,

Petitioners,

v.

THE HORVITZ COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioners (plaintiffs in the trial court) are 38 property owners and residents of the Village of Gates Mills, Ohio. The respondents are the Director of Highways of the State of Ohio; the Division Engineer of the Ohio Department of Highways; the City of Mayfield Heights, Ohio; the Mayor of the City of Mayfield Heights; and The Horvitz Construction Company, which contracted with the State of Ohio to construct a section of the "North-South" limited access highway through certain eastern suburbs of Cleveland, Ohio. One such suburb is the City of Mayfield Heights.

CITATIONS TO OPINIONS BELOW.

This action was instituted in the Court of Common Pleas of Cuyahoga County, Ohio. The opinion issued by that court is not reported, but it is reproduced at pages 1a to 20a of the Separate Appendix to this petition.

The respondents appealed from the injunction issued by the Court of Common Pleas in favor of the plaintiffs, to the Court of Appeals for Cuyahoga County, Ohio. The latter court reversed the judgment of the Court of Common Pleas. The opinion by the Court of Appeals is reported in 184 N. E. 2d 231, and is reproduced at pages 21a to 36a of the Separate Appendix to this petition.

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals. The Ohio Supreme Court's opinion is reported in 175 Ohio St. 521 and in 196 N. E. 2d 764. That opinion is also reproduced at pages 39a to 49a of the Separate Appendix to this petition.

JURISDICTION.

The decision by the Ohio Supreme Court was issued March 4, 1964. The Ohio Supreme Court is the highest appellate court in the State of Ohio.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED.

(1) Does the state deprive property owners of their property without due process of law, in violation of Section 1 of the 14th Amendment to the Federal Constitution, when, acting through its Department of Highways and the City of Mayfield Heights, it constructs a storm sewer designed to collect surface waters over a sizable land area within the municipal corporation and discharges such waters into a natural stream or watercourse which has its origin within the boundaries of the municipal corporation and which flows across the lands and past the homes of the property owners and the watercourse has in recent years repeatedly overflowed its banks during periods of heavy rains and the new sewer will during such periods in the future discharge into the stream a volume

of water far in excess of the capacity of the stream, so that the lands of the property owners are certain to be eroded by the flood waters and the homes and adjoining buildings of certain of the property owners will be undermined?

(2) Did the decision by the Supreme Court of Ohio constitute a denial of due process of law, contrary to the 14th Amendment to the Federal Constitution, when it held that petitioners were guilty of laches and therefore had lost their right to have the respondents enjoined from causing petitioners' lands to be overflowed, because the petitioners, according to the Court, were chargeable with having knowledge for some two years before the instant suit was filed of the respondents' plan to use the natural watercourse across petitioners' lands as a part of the drainage system serving the proposed North-South limited access highway, the factual basis for charging petitioners with knowledge of the respondents' drainage plans being that the public generally had been informed by various news media of the proposed highway construction and that petitioners could have examined construction plans on file in the office of the Ohio Department of Highways, thereby discovering respondents' drainage plans and the threat to petitioners' properties sooner than when actual construction of the sewer began?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is that part of Section 1 of the 14th Amendment to the Federal Constitution which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE.

The petitioners are residents of the Village of Gates Mills, Ohio. They seek by this action to prevent the Ohio Department of Highways and the City of Mayfield Heights, Ohio, acting conjunctively, from causing damage to their properties by discharging the waters transported by a newly constructed storm sewer 6 feet in internal diameter into a small stream or natural watercourse which flows across or along the boundaries of petitioners' lands. The channel of the natural stream will be caused, by the excessive flow of water from the new sewer, to repeatedly overflow its banks and flood the petitioners' adjacent lands.

The Village of Gates Mills borders the City of Mayfield Heights on the latter's east boundary line. Both municipalities are crossed from east to west by U. S. Highway No. 322, otherwise known as Mayfield Road. Approximately one mile east of the common boundary line between the two municipalities lies the Chagrin River Valley, which extends in a north-south direction and through which flows the Chagrin River. The latter is a public waterway, flowing north and emptying into Lake Erie. (R. 753.)

At a point several hundred feet west of the common boundary line between the two municipalities, in the vicinity of Mayfield Road, the natural stream or watercourse originates within the boundaries of the City of Mayfield Heights. Plaintiffs' Exhibit 10, at page 737 of the Record, is a picture of this stream near its point of origin. This stream has never been identified by a name but it is referred to for the purpose of this action as "Deer Creek."

Deer Creek flows, generally speaking, in a northeasterly direction. It crosses the boundary line from Mayfield Heights into the Village of Gates Mills and flows

across the lands and past the homes of the petitioners. It descends into the Chagrin River Valley and becomes a part of the Chagrin River. (R. 164.) The homes of many of the petitioners are constructed adjacent to Deer Creek, amid stands of great hardwood deciduous trees and hemlocks. (R. 107, 150, 591, 676-685, Plaintiff's Exhibits 19 and 20; R. 741-742.)

Prior to 1955, the water that flowed in Deer Creek originated from natural springs along its banks and from underground seepage which drained generally from the higher land which lies to the west and south of the stream. There was also one storm sewer under Mayfield Road which transported surface waters collected from a land area west of Deer Creek and south of Mayfield Road. This sewer was constructed in 1925 by Cuyahoga County and has a diameter of 48 inches at the point of discharge. It empties into Deer Creek.

Prior to 1955, Deer Creek was never known to have overflowed its banks or otherwise cause damage to the petitioners' properties. (R. 65, 68, 114, 129, 141, 143, 688.)

In 1956 a shopping center known as "Eastgate" was constructed in Mayfield Heights, close to the boundary line between Gates Mills and Mayfield Heights. (R. 194, 457.) Eastgate, with its paved parking area, covers 40 acres. (R. 373.) Surface waters are collected and drained from this area by a sewer 5 feet in diameter, which discharges into Deer Creek. Since the construction of Eastgate, the flow from the 5-foot sewer and from the old Mayfield Road 48-inch sewer, together with the water that naturally finds its way to the stream, have caused Deer Creek during periods of heavy rains to repeatedly overflow its banks and much erosion of land and uprooting of trees on petitioners' properties have resulted. (R. 105, 141.)

The new 6-foot sewer constructed by the respondents parallels Mayfield Road and, of course, parallels the old 48-inch sewer under that Road. The cost of constructing the new 6-foot sewer was shared jointly by the Department of Highways and Mayfield Heights. (R. 493.) This sewer is designed to carry off surface waters collected over a portion of the newly constructed North-South Freeway lying south of Mayfield Road, and it will also drain an area of some 570 acres lying south of Mayfield Road and within Mayfield Heights. (R. 301-302, 374.) This area is indicated by a yellow shading in defendants' Exhibit "B," at page 755 of the Record.

The new 6-foot sewer, which terminates at Deer Creek and discharges its flow into Deer Creek, poses an immediate and constant threat to the petitioners' properties. This is because it will add a tremendous volume of water to the flow from the other two sewers discharging into Deer Creek, and since 1957 Deer Creek has repeatedly demonstrated that it is already burdened with a flow that is beyond the capacity of the stream channel to carry during heavy rains.

The dimensions of the Deer Creek channel between the point where it crosses the boundary line between Mayfield Heights and Gates Mills and the point where it enters a steeply descending and winding ravine, about one-half mile east of the Mayfield Heights boundary line, was measured by petitioners' witnesses during the trial in the Court of Common Pleas. Those measurements are recorded in plaintiffs' Exhibit 3, page 735 of the Record. The average width of the streambed in this area is 14.9 feet. The average depth of the banks is 2 feet and 4 inches. The average cross-sectional area of the stream is 34.3 square feet. Views depicting the general size of the Deer Creek channel are provided by plaintiffs' Exhibits 15, 16, 17 and 18, at pages 739 and 740 of the Record.

The capacity of the Deer Creek channel when flowing full is 250 cubic feet of water per second. (R. 206.)

The witnesses for plaintiffs and defendants were in substantial agreement during trial regarding the carrying capacity of the sewers emptying into Deer Creek. (R. 433, 446, 526-527.) The old 48-inch sewer under Mayfield Road discharges when flowing full about 91 cubic feet per second. (R. 179.) The 5-foot sewer under Eastgate discharges when flowing full 187 cubic feet per second. (R. 180.) Together these two sewers deliver 278 cubic feet of water per second into Deer Creek, while the Deer Creek channel will overflow its banks if it is subjected to a flow of more than 250 cubic feet of water per second.

The new 6-foot sewer when flowing full will discharge 278 cubic feet of water per second into Deer Creek—thus doubling the volume of water that sewers already discharge into Deer Creek during periods of heavy rain. (R. 178, 206-209.)

In addition to the new 6-foot sewer, the City of Mayfield Heights constructed, while the trial of this case was being conducted in the Court of Common Pleas, a new 54-inch oval sewer draining the area to the south of Mayfield Road and discharging into Deer Creek. It has a capacity of 80 cubic feet of water per second. (R. 209, 446.) And during the trial the city engineer for Mayfield Heights testified that a second 54-inch oval sewer is planned for draining the area to the southwest and discharging into Deer Creek. (R. 448.)

The petitioners' original complaint was filed in the Court of Common Pleas on December 18, 1961 (R. 18), within one week after the 6-foot sewer tile was laid out along Mayfield Road preparatory to starting installation. (Plaintiffs' Exhibits 9 and 12, R. 737-738.)

The Raising of the Constitutional Issue.

Petitioners' amended complaint asserted that if the defendants installed the 6-foot sewer as planned, so that it would discharge into Deer Creek, such action would be unlawful because "(c) The result will be the taking of the property of these plaintiffs for public use without due process of law and just compensation." (R. 5.)

The Court of Common Pleas held that the plaintiffs were entitled to injunctive relief, on the ground that plaintiffs' riparian rights would be violated by the flow from the 6-foot sewer, and for the further reason that the new sewer will unlawfully divert a substantial flow of water from foreign watersheds into Deer Creek and cause it to flow across plaintiffs' properties. The Court of Common Pleas did not pass upon the constitutional issue. An injunction was issued February 10, 1962, ordering defendants not to permit the water carried by the new sewer to empty into Deer Creek. (R. 19.)

The Court of Appeals for Cuyahoga County reversed the judgment of the Court of Common Pleas. In doing so the Court of Appeals took note, by the statement quoted below, of the constitutional issue raised by the amended complaint. But the Court of Appeals did not rule upon this issue:

> "It is further alleged that the unnatural diversion and collection of surface waters and the unnatural discharge of the same in such volume and rate of flow over the lands and homes of the plaintiffs will cause irreparable damage to plaintiffs' lands and homes, that the defendants' conduct as alleged is a taking of plaintiffs' property without due process, * * *." (p. 23a, Separate Appendix.)

On appeal to the Supreme Court of Ohio, the petitioners' assignments of error included the following:

"(2) The final order, judgment and decree, insofar as it finds plaintiffs guilty of laches is unsupported by any evidence whatsoever, so that these parties have been deprived of their property without due process of law in violation of Amendment XIV of the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Ohio.

"(3) The judgment rendered is contrary to law, and its effect constitutes the taking of private property for public use without compensation, in violation of Section 19 of the Constitution of the State of Ohio." (p. 37a, Separate Appendix.)

The original brief filed by petitioners with the Supreme Court of Ohio argued, at pages 45 to 49, this proposition: "If the judgment of the Court of Appeals is correct, then plaintiffs-appellants have no remedy at law or in equity, and their property has been taken for public use without compensation in contravention of Article I, Section 19 of the Constitution of this State and of the Fourteenth Amendment to the Constitution of the United States."

The first section of petitioners' reply brief filed with the Supreme Court of Ohio had this title:

"Defendants' plan to construct a storm sewer in such a manner that the water which it discharges will flow across plaintiffs' lands and cause damage to plaintiffs' properties, will be a violation of the guarantee contained in the Federal and state Constitutions that persons shall not be deprived of their property by governmental action except in accordance with due process of law."

Thirty-three pages of petitioners' reply brief were devoted to a discussion of this constitutional issue.

The Ohio Supreme Court ruled against petitioners and affirmed the judgment of the Court of Appeals. The

Supreme Court based its decision on three grounds. The first ground was that plaintiffs' riparian rights were not violated by defendants' action, for the reason that lower riparian owners must be presumed to have purchased their lands aware of the contingency that they may in the future be subjected to flooding and damaging, by the actions of dominant landowners collecting surface waters and accelerating the flow thereof into natural watercourses while developing their properties.

The second ground upon which the Supreme Court affirmed the judgment below was that the existence of the old 48-inch Mayfield sewer and its transporting of waters from foreign watersheds and discharging them into Deer Creek for more than 21 years had developed into a prescriptive right in favor of defendants to continue such diversion of foreign waters, and such prescriptive right, the Ohio Supreme Court ruled, included the right to install a new 6-foot sewer in addition to the old 48-inch sewer for the purpose of transporting and diverting water in greater volume and at accelerated rates from the foreign watersheds into Deer Creek and across plaintiffs' properties.

The Supreme Court held, as the third ground for affirming the judgment of the Court of Appeals, that plaintiffs were guilty of laches in instituting their suit to enjoin the defendants from installing the new sewer so that it would empty into Deer Creek. The Court declared plaintiffs were guilty of laches because they had had constructive knowledge, as members of the public, for more than two years prior to instituting suit of the proposed construction of the freeway and, furthermore, plaintiffs must have been "aware that there would be drainage problems involved in a construction of this magnitude." (pp. 40a-48a, Separate Appendix.)

The Ohio Supreme Court refrained from any overt recognition of the constitutional issue based upon the Due Process Clause of the 14th Amendment. We must conclude that the Court either chose to disregard the issue in arriving at its decision, or we must conclude that the Ohio Court has by implication overruled petitioners' contention that the respondents' construction of the new sewer as planned will result in a taking of petitioners' properties without due process of law and in violation of the 14th Amendment.

Moreover, the Ohio Supreme Court refrained from taking note of those facts upon which petitioners base their claim that respondents' actions will indisputably result in erosion and other damage to petitioners' properties and will constitute a "taking" of petitioners' properties in violation of the Due Process Clause of the Fourteenth Amendment.

The petitioners do not believe that the action of the Ohio Supreme Court, in failing to take notice of the constitutional issue urged by petitioners and to rule upon it, and in refraining from recognizing those facts upon which the constitutional claim is based, can have the effect of preventing this Court from reviewing the constitutional issues posed by this litigation. *Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U. S. 226, at 232 (1897.) The facts upon which those constitutional issues are based are most accurately set forth in the decision rendered by Judge Donald F. Lybarger of the Court of Common Pleas, following a trial of eight days' duration. That decision is reproduced at pages 1a to 20a of the Separate Appendix.

REASONS FOR GRANTING THE WRIT.

The Ohio Supreme Court has decided a case which presents a constitutional question of substance in a way that is not in accord with the decisions of this Court, among which are the following cases:

Pumpelly v. Green Bay Co., 80 U. S. 166 (1871);
United States v. Cress, 243 U. S. 316 (1917);
United States v. Kelly; 243 U. S. 316 (1916);
Jacobs v. United States, 290 U. S. 13 (1933);
United States v. Kansas City Life Insurance Co., 339 U. S. 799 (1950);
Peabody v. United States, 231 U. S. 530 (1913);
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 326 (1922);
United States v. Causby, 328 U. S. 256 (1946);
Griggs v. Allegheny County, 369 U. S. 84 (1962).

The Ohio Supreme Court ruled, in substance, that the Ohio Department of Highways and the City of Mayfield Heights may, in the reasonable use of land over which they have control, collect surface waters in a sewer or system of sewers and discharge such waters into a natural stream flowing across privately owned properties in any volume and velocity that serves the State's purpose, and the resultant overflowing of the banks of the stream, though it causes flooding and eroding and damaging of the privately owned properties, is lawful and proper.

The petitioners believe that the decisions by this Court in the above cited cases involved factual situations and presented constitutional issues that are substantially the same as are posed by the instant suit. The petitioners understand those decisions to hold that any activities undertaken by, or on behalf of, the Federal Government

or of a state government which cause direct and material damage to adjacent, privately owned properties, or which materially interfere with the owners' use and enjoyment of their properties, constitute a taking of private property without due process of law, contrary to the Due Process Clauses in the 5th and the 14th Amendments to the Federal Constitution.

The petitioners believe that when a state, acting through its engineers and contractors, constructs a huge storm sewer so that the waters which the sewer transports are discharged into a comparatively small natural stream which flows across the lands and past the homes of private owners, and the agents of the state know or have the means of knowing that the stream in recent years has repeatedly overflowed its banks and caused serious erosion and other damage to the private properties through which the stream flows, and the capacity of the new sewer flowing alone is greater than the capacity of the stream channel, such action on the part of the state constitutes a planned, deliberate, and calculated invasion of private property rights, and is contrary to the decisions rendered by this Court in the above cited cases.

Moreover, it would seem appropriate that departments in the executive branch of a state government, and municipal corporations, should be held by reason of their large resources and the regular employment of professional personnel, to a more rigid rule or standard of non-invasion of private property than applies to the activities of private individuals in the use and development of their lands, as was held in the case of *Milhouse v. State Highway Department*, 1945 S. C. 33, 8 S. E. 2d 852, 128 A. L. R. 1186 (1940), and was also held by this Court in *United States v. Kansas City Life Insurance Co.*, 339 U. S. 799

(1950). In the latter case, Mr. Justice Minton dissented from the majority decision on the ground that he believed that the Federal Government should not be held to have violated private property rights, contrary to the guarantees of the 5th Amendment, by the act of raising the water level to a height which destroyed the usefulness of the plaintiff's land for agricultural purposes, when, under the common law of the state in which the land was located, an individual could have caused similar damage to the plaintiff's land without incurring responsibility to the plaintiff.

In addition to the foregoing, the decision by the Supreme Court of Ohio is not, petitioners believe, in accord with another decision of this Court rendered in the case of *Schroeder v. City of New York*, 371 U. S. 208 (1962).

The Ohio Supreme Court held that petitioners have lost their right to equitable relief from respondents' threatened invasion of their property rights because of laches. The Court held that petitioners were guilty of laches because some two years before the instant suit was filed the newspapers and other news media had informed the public that the Department of Highways was planning to construct the North-South Freeway. The petitioners being thus made aware of the Department of Highways' intentions, the Supreme Court reasoned, the petitioners are chargeable with knowledge that plans for the construction of such a highway must necessarily include plans for a drainage system to serve the highway, and the petitioners should have gone to the office of the Department of Highways, examined the construction plans, learned of respondents' plans to use the natural watercourse across petitioners' properties as a part of the highway drainage system, and, hence, should have instituted suit promptly,

before the construction of the highway began, for the purpose of challenging the lawfulness of the respondents' plans on the grounds that they contemplated an invasion of petitioners' property rights.

In short, the Ohio Supreme Court's holding that petitioners have lost their right to equitable relief, rests upon the proposition that the petitioners are responsible for discovering the fact that the Department of Highways' plans for a drainage system contemplated an invasion of the petitioners' properties. Petitioners believe that this decision puts the responsibility for affirmative action on the wrong party, and in doing so it disregards the requirements of due process.

In *Schroeder v. City of New York*, this Court held that an enactment of the New York legislature which authorized municipal corporations to appropriate sources of water from riparian landowners by first publishing notice of the municipality's intention in a local newspaper and posting handbills in conspicuous places in the vicinity of the stream from which the water was to be taken, violated the notice requirements of the Due Process Clause. This Court held that when the names and addresses of the riparian owners who would be affected by the taking could have readily been ascertained by the municipality, the minimum requirement of due process contemplates that nothing less than personal notice delivered by the mails to apprise the owners of the municipality's intentions will suffice.

The requirement of procedural due process imposed by the 14th Amendment is the same, petitioners understand, whether action by an agency of the state is undertaken pursuant to statute or is undertaken without statu-

tory guidance.* When the respondents in the instant case decided to use Deer Creek as a part of the drainage system to serve the new Freeway and also serve the City of Mayfield Heights, they did so on the assumption that Deer Creek would be used to any extent necessary to meet the respondents' drainage requirements. Respondents have defended their actions throughout this litigation with the contention that they may, and will, discharge into Deer Creek any volume of water and velocity of flow that serves their purpose, and that petitioners have no legal right to interfere with the respondents' actions regardless of the extent and nature of the flooding and damage that may be inflicted upon petitioners' properties. And it is upon this premise that the Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

Petitioners believe that the requirement of procedural due process imposed upon state actions by the 14th Amendment, as interpreted in the *Schroeder* case, should have caused the Ohio Supreme Court to hold that the Department of Highways and the City of Mayfield Heights had an obligation to give timely, personal notice to the owners of the Deer Creek channel of their intention to appropriate the facilities of Deer Creek channel as part of their plans for a drainage system, instead of holding, as the Ohio Supreme Court did, that the duty to promptly discover the respondents' plans rested on the property owners and

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* "But it must be observed that the prohibitions of the (14th) amendment refer to all instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'" *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226, at 223 (1897).

they were guilty of laches and they lost their right to have their properties protected by injunction when they failed to promptly discover respondents' plans and institute suit before the construction of the freeway began.

CONCLUSION.

For the foregoing reasons, petitioners pray that a writ of certiorari be issued as above set forth.

Respectfully submitted,

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